

THREE MEMBER DUE PROCESS HEARING PANEL

EMPOWERED PURSUANT TO 162.961 R.S.MO.

HEARING DECISION

Student's Name:

Parent's Name:

Local Education Agency: Windsor C-1 School District

6208 Highway 61-67

Imperial, MO 63052-2311

Agency Representatives: Teri B. Goldman

Mickes, Tueth, Keeney, Cooper, Mohan

& Jackstadt, P.C. Attorney at Law

425 South Woods Mill Road, Suite 300

St. Louis, MO 63017

Parent Representative: Dayna Deck

Attorney At Law

6609 Clayton Road

Suite 1 East

St. Louis, MO 63117

Hearing Dates: October 10, 11, and 13, 2000

Date of Report: December 15, 2000

Hearing Officers: Patrick O. Boyle,

Christine Montgomery and Karen Schwartz

Three Member Due Process Hearing Panel

Empowered Pursuant to 162.961 R.S.Mo

HEARING DECISION

ISSUE

Parents disagree with the student's proposed placement in a "self-contained classroom" at the Local Education Agency (LEA) for academic instruction with regular fourth grade classes for art, library instruction, physical education and music but, parents seek a private placement at Central Institute for the Deaf with reimbursement for all costs of private placement.

TIME LINE

Parent's request for a due process hearing was received by the Missouri Department of Elementary and Secondary Education (DESE) on April 12, 2000. An LEA request for extension of time for decision was granted on May 8, 2000 and, the time for decision extended to October 1, 2000. By consent of all parties, the time for decision was again extended on August 24, 2000 to November 13, 2000. A hearing was held on October 10, 11, and 13, 2000 and, the parties requested an extension of time for the purpose of submitting post hearing briefs. On October 16, 2000 the time for decision was extended to December 15, 2000 and, this decision is rendered as of December 15, 2000.

FINDINGS OF FACT

1. Student (dob:) is a -year-old boy who has resided in the LEA since May 1999.
2. Student is hearing-impaired as a result of having meningitis at ten months of age. In May 1992, Student received a cochlear implant. Student received oral stimulation in a program at St. Joseph Institute for the Deaf in St. Louis ("St. Joseph"). Student attended St. Joseph until 1998.
3. Control of static electricity is important for children with cochlear implants and, such control of static electricity is accomplished in large part by use of Static Guard and, avoidance of plastic. The chances of losing a cochlear implants mapping from static electricity cannot be eliminated entirely. Cochlear implants can be adjusted to eliminate some background noise.
4. Student has above-average intellectual potential.
5. In 1998 Student began attending Central Institute for the Deaf (CID).
6. In November 1999, Student's parent contacted the LEA. Parent indicated that she wanted to know how she could get the District to pay for her son's expenses at CID. LEA explained to parent the evaluation and eligibility procedures that would need to be followed, that an IEP would be prepared if student was eligible for services, and that placement options would then be discussed.
7. On January 19, 2000 student's IEP team met. A CID Coordinator attended the meeting. The IEP team completed a Summary of Screening Results for Initial & Reassessments and determined that no assessment was needed. The IEP team determined that Student was eligible for service under the IDEA based on a hearing-impaired diagnosis.
8. After determining the student's present level of performance, Student's IEP team prepared goals and objectives that addressed his disability-related needs.

Information provided by the parent and CID was used to develop the goals and objectives. The goals and objectives were the result of cooperative effort by the LEA and the parent. The parent has not claimed that the goals and objectives are inappropriate or otherwise fail to comply with requirements of the IDEA. The LEA did not refuse to consider any information that the parent wanted to offer to the IEP team at the January 19, 2000 IEP meeting.

9. The January 19, 2000 IEP includes provisions for speech therapy at 30 minutes per day, 5 days per week, an annual audiological evaluation, and implant services as needed. Everyone at the meeting agreed that the amount of time for speech therapy under the January 19, 2000 IEP was appropriate. LEA offered testimony that the speech therapy services would have been implemented as written in the IEP. The parents have not alleged that those services are inappropriate. The IEP also provided for control of static electricity and a sound field system within the classroom.

10. The January 19, 2000 IEP provides that student would spent 180 minutes per week in a regular education program for art, music, physical education and library instruction at the fourth grade level.

11. The IEP team reviewed implant maintenance needs that student might have. Testimony was offered that the LEA was able to troubleshoot Student's implant needs, and that if they could not address the problem, arrangements would have been made to take student to CID or Children's Hospital in St. Louis.

12. After the goals and objectives of the January 19, 2000 IEP were completed, the team determined the student's placement. Various alternatives, beginning with the least restrictive were reviewed, and the Team agreed that student's services should be provided in a self-contained placement at the LEA.

13. The LEA and parents disagreed on the location of the self-contained placement. The LEA proposed placement is in the LEA's self-contained

classroom for the hearing impaired in an integrated school setting. The parents stated that they wanted placement only at CID.

14. A Notice of Action was completed during the January 19, 2000 IEP meeting which described the LEA's proposed placement. Specifically, the Notice indicated that a private school placement was rejected because it lacked mainstreaming opportunities and access to the general education curriculum.

15. By a letter dated January 20, 2000 parent requested a resolution conference. Parent stated that she did not believe the goals and objectives developed for student could be achieved in the setting that had been proposed. A resolution conference was held on January 31, 2000. The LEA's superintendent assured the parents that the LEA could provide student an appropriate education.

16. On April 11, 2000, the parents mailed a request for a due process hearing. A three-day due process hearing was conducted on October 10, 11, and 13, 2000. Both parties were represented by counsel. Parents have since dismissed their counsel.

17. LEA's teacher for the hearing impaired testified that the LEA's proposed placement allowed Student access to the general curriculum and that it was important that with this student's proficiency he attend a school with neighborhood peers where he could be bombarded with language. The teacher testified that it is not necessary for student to have exposure to and significant interactions with hearing-impaired students to receive educational benefit.

18. LEA's teacher for the hearing impaired testified that based on her experience, exposing a student using the auditory oral method to sign language would not inhibit the student's ability as an oral communicator. The teacher testified that student could have achieved the same amount of advancement in his speech, language, and listening ability in her classroom as he might have at CID.

19. The current teacher of the hearing impaired at LEA testified that student could receive educational benefit if he is not educated with other children who have cochlear implants. The teacher testified that he could implement the January 19, 2000 IEP at the LEA and, that this IEP provided student an appropriate education. The teacher testified that the integration activities provided for student in the January 19, 2000 IEP are appropriate and, that it is appropriate for student to use skills that he has learned with age appropriate children who are not disabled. The current teacher has had other hearing-impaired students who have been successfully integrated into activities with nondisabled peers.

20. The Director of Special Services for the LEA testified that the decision as to whether to mainstream a child requires consideration of various factors, including age-appropriate peers and modeled appropriate behaviors. She testified that she believes the integration activities contained in the January 19, 2000 IEP are appropriate. She testified that there were children in the LEA who are not able to communicate with same-age peers, but who are successfully integrated with those peers. She agreed with CID testimony that student could learn and benefit outside of an optimal acoustic environment. She testified that LEA's teachers of the hearing impaired were qualified to be the teachers in the LEA's classroom for hearing-impaired children and, that they could successfully implement the January 19, 2000 IEP. She testified that the January 19, 2000 IEP would provide student with educational benefit.

DECISION AND RATIONALE

The LEA offered a free appropriate public education to the student in a self-contained classroom at the LEA under the IEP of January 19, 2000 with main stream instruction in the areas of art, library instruction, physical education and music. No objection has been raised concerning the IEP offered to the student

and, no evidence has been offered showing that the LEA is unable to implement the IEP at the placement proposed in an LEA self-contained classroom.

The LEA's determination of student's placement is appropriate and parent's are not entitled to reimbursement for their unilateral private placement of student at the Central Institute for the Deaf.

APPEAL PROCEDURE

Either party has the right to appeal this decision within 30 days to a State Court of competent jurisdiction pursuant to Chapter 536 of the Revised Statutes of Missouri, or to a Federal Court.

Panel Members Supporting Decision Panel Members Opposing Decision

Patrick O. Boyle Karen Schwartz

Christine Montgomery

THREE MEMBER DUE PROCESS HEARING PANEL

EMPOWERED PURSUANT TO 162.961 R.S.MO

DISSENTING OPINION

Student's Name:

Parents Names:

Local Education Agency: Windsor C-1 School District

6208 Highway 61-67

Imperial, Missouri 63052

LEA Attorneys: Teri B. Goldman

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Hearing Dates: October 10, 11 and 13, 2000

Date of Report: December 15, 2000

Hearing Officers: Patrick O. Boyle

Christine Montgomery

Karen F. Schwartz

Dissenting Opinion of: Karen F. Schwartz

Three Member Due Process Hearing Panel

Empowered Pursuant to 162.96 1 R.S.MO

HEARING DECISION - DISSENTING OPINION

ISSUE

Parents disagree with proposed placement of student in a self-contained classroom at the Local Education Agency (LEA) for academic instruction and regular fourth grade classes for art, library instruction, music and physical education. Parents seek reimbursement for private placement at Central Institute for the Deaf.

TIME LINE

Parent's request for a due process hearing was received by the Missouri Department of Elementary and Secondary Education (DESE) on April 12, 2000. An LEA request for extension of time for decision was granted on May 8, 2000 and the time for decision was extended to October 1, 2000. By consent of all parties, the time for decision was again extended on August 22, 2000 to November 13, 2000. A hearing was held on October 10, 11 and 13, 2000 and the parties requested an extension of time for the purpose of submitting post hearing briefs. On October 16, 2000 the time for decision was extended to December 15, 2000 and this decision is rendered as of December 15, 2000.

FINDINGS OF FACT

(Corresponding to numbered Findings of Fact in
Majority Opinion)

1. Student (**d/o/b**) is a year old boy (at time of hearing) who has resided in the LEA since May, 1999.

2. Student is hearing impaired as a result of having meningitis at ten months of age. In May, 1992 Student received first cochlear implant. Student received oral training at St. Joseph Institute for the Deaf (Vol.11, p.13 ,L.24). He attended parent/infant program and pre-school at St. Joseph (Vol.11 p.14, L. 14-15). Student received second implant 5 years and four months after first implant (Vol.11 p.15.L4-5). Student had third implant due to device failure approximately one year after second implant. (Vol.11, p.17, L. 110-13).

Parent stated that student is in danger of requiring fourth implant and a fourth surgical procedure is required. (Vol. II p.17, L. 15-16).

3. Control of static electricity is important for children with cochlear implants and control of static electricity may be accomplished in large part by ongoing vigilance, ongoing and regular use of Static Guard type product, avoidance of plastic, computer static electricity prevention devices, personal wrist band device while using computers, use of special types of carpeting although the chances of losing or damaging cochlear implants, their components or their mapping from static electricity cannot be eliminated entirely. While cochlear implants can be adjusted to reduce or eliminate some background noise, (Vol.1, p.93, L.19-24) it may just handle some of the noisy situations for student to tolerate better than others according to the testimony of Lisa Davidson, Audiologist at CID). Additionally, she acknowledges (Vol.1, pp. 93-4, L. 25-L.5) that if student goes into a more noisy environment, it makes it more difficult for him to learn to distinguish sounds and speak and do all the things they're trying to teach him to do.

In responding to questioning by Respondent's attorney, Mr. Yelkovac concerning the American Speech/Language Hearing Association (ASHA) guidelines regarding unoccupied classroom noise and acoustics in the educational setting, Ms. Davidson explained that children with hearing impairments always need the (ASHA) guidelines to perform optimally in their environment and that compared to a normally hearing child, it could be ideal but that hearing impaired children need this type of environment to really benefit from their devices and from the instruction. "There are studies that show that children with hearing impairments that are put in adverse hearing conditions, noise, reverberation, perform significantly poorer on speech perception tests and just over all other language measures".

Vol. I p.107).

4. I agree with majority's finding. It states, "Student has above-average intellectual potential."

5. I agree with majority's finding. It states, "In 1998 Student began attending Central Institute for the Deaf (CID)."

6. At Vol. II pp. 21-22, Plaintiff testified she contacted the LEA to check available options, that she heard the LEA where her older son would attend also had oral services within the district and that the Co-Op that the LEA was part of might have been contracting for oral services. There is no testimony from Plaintiff either in direct or redirect exam by her attorney Ms. Deck or during Mr. Yelkovac's cross or re-cross that either supports or refutes the statement in majority opinion "Parent indicated that she wanted to know how she could get the District to pay for her son's expenses at CID". At pages 46-47, Vol. III the District Director of Special Services (Tern Shank) testified re Plaintiff "...she said I just want to know how I can see about getting the school district to pay for my son to go to CID." In cross exam by Plaintiff's attorney, Tern Shank said that what she earlier testified to was "not exactly word for word what Plaintiff said" but "...that was the major

content that I got out of it." and then responded that there is nothing improper about a parent asking for that. (Vol. III, p. 77).

7. I agree with majority's finding. It states, "On January 19, 2000 student's IEP team met. A CID Coordinator attended the meeting. The IEP team completed a Summary of Screening Results for Initial & Reassessments and determined that no assessment was needed. The IEP team determined that Student was eligible for service under the IDEA based on a hearing-impaired diagnosis."

8. Information provided at several places in Plaintiff's testimony does not support the last sentence in majority's opinion "...the LEA team did not refuse to consider any information that the parent wanted to offer to the IEP team at the January 19, 2000 IEP meeting." On pages 44-45 of Vol. II, Plaintiff states "...I had documentation for each item on the outline that I was able to give to them. They weren't interested in looking at those things. ..I had the information in my possession. I attempted to give them parts of the information when they were relevant. They didn't take them out of my hand. They couldn't have read them."

9. While there was agreement that the January 19, 2000 IEP includes speech therapy at 30 minutes per day, 5 days per week, an annual audiological evaluation and implant services as needed, Plaintiff certainly alleged that they object to aspects of these services. Plaintiff testified that she was told by the LEA audiologist that these services would be provided by two and perhaps three different individuals (Vol. II, p.58). Further, (p.59) Plaintiff expressed concerns that person providing speech therapy needs to be familiar with the way a cochlear implant recipient hears and speaks and to recognize when a change in mapping might be beneficial (Vol. II, p.59). Plaintiff testified that Elaine Burke had told her she did not have experience with kids with cochlear implants. (Vol. II, p.59). Plaintiff expressed concern at the alternative of lengthier sessions on fewer *days where IEP called for daily provision of a fixed period (30 minutes) of therapy.*

In Plaintiff's post-hearing brief, she states at p. 7 that "The district has proposed to implement ' speech therapy using several different therapists each week, due to the lack of availability of the same person each day. This method of therapy potentially lacks the stability to result in the meeting of his speech goals and objectives. The speech therapists proposed by the school have had no training or experience with cochlear implants, nor are they familiar with the speech, language, and hearing patterns unique to cochlear implant recipients." Also at p. 7 she indicates that they do not feel classroom space proposed would meet the student's acoustical needs.

The IEP provides for control of static electricity and a sound field system within the classroom.

10. Majority opinion states @ 10, "The January 19, 2000 IEP provides that student would spend 180 minutes per week in a regular education program for art, music, physical education and library instruction at the fourth grade level." This is correct as stated but does not reflect testimony concerning logistics, concern for child's limited ability to communicate with same age peers at a significantly low level, that an untrained aide without experience working with students with cochlear implants would accompany student to library to translate for him and assist him and thus obviate benefit of the peer interaction the LEA states is a critical reason he needs to be mainstreamed there.

11. The IEP team reviewed implant maintenance needs that student might have. Testimony was offered (BY THE LEA) that the LEA was able to troubleshoot student's implant needs, and that if they could not address the problem arrangements would have been made to take student to Children's Hospital in St. Louis. Dissenting panel member does not find reference to providing services at CID per majority's finding.

Plaintiff said that until the time of the hearing before the 3-Member Panel, the LEA had not provided details of how they would deal with cochlear implant

related issues they recognized but were not able to deal with. She expressed concern that student would lose a considerable amount of school time to address any such problems. Additionally, the District Director of Special Education, Tern Shank testified that she told the parents "...we felt very confident in doing troubleshooting type things, you know, right there in the classroom between the audiologist, speech therapist and the classroom teacher but that if there was something major that was beyond our capabilities that we would agree to get him Somewhere that they could address those needs." (Vol. III, pp. 64-65). However, Petitioner testified that Elaine Burke the audiologist and speech therapist for the district told her that she had no experience with kids with cochlear implants. (Vol. II, pp. 59-60).

12. While the IEP team did agree the student's services should be provided in a self-contained placement, the parents, assumed to be a component of the team, did not agree with the placement at the LEA. Thus, statement in Majority's Opinion "...the Team agreed that student's services should be provided in a self-contained placement at the LEA." is incorrect.

13. The "integrated school setting" was in a self-contained classroom and the integrations consist of art, library, music and physical education for 180 minutes per week; essentially non-academic or non core-content integrations.

Majority states, (last sentence Finding 13) "The parents stated that they wanted placement only at CID." *This statement tracks to Respondent's Proposed Finding of Fact with references in Vol. II @ p. 58, 60, 63.* While p.63 reflects that Terri Shank's conclusion at the end of the IEP process and discussions concerning the parents' placement disagreement was, "That they wanted their child to be educated by the Windsor School District at Central Institute for the Deaf."

Page 60 reflects that the reason the LEA rejected the private school setting was, again according to Terri Shank, "Due to lack of mainstreaming opportunities and access to the general ed curriculum" and that the main activity that the LEA could

offer which CID could not offer "Well, the main one is just an opportunity to be educated with non-disabled peers."

On p. 58 Ms. Shank discusses her conclusion regarding the parents concerns regarding providing appropriate education for their son "I guess at that point Mr. and Mrs. (parents) felt like the goals and objectives could not be implemented appropriately in our setting but they could be at the CID setting."

Nothing could be found in the documents for this hearing, the notes taken during the hearing by this hearing officer, nor in any of the three volumes of the transcript which support the statement that "The parents stated that they wanted placement only at CID."

14. The LEA's "Notice of Action" dated 1/19/2000 indicates as the reason for rejection of private placement , "...due to lack of mainstream opportunities and access to the general ed curriculum" *The very IEP they had just completed has no plan, suggestion, goal or objective proposing any access to the general ed curriculum.* Parent and CID personnel testified the child would not receive benefit with same grade peers in the proposed non-academic integrations, that he faced potential for negative consequences in such integrations, and was not even considered for academic or core-content integrations.

15. Majority finding states that "By a letter dated January 20, 2000 parent requested a resolution conference. Parent stated that she did not believe the goals and objectives developed for student could be achieved in the setting that had been proposed. A resolution conference was held on January 31,2000. The LEA's superintendent assured the parents that the LEA could provide student an appropriate education." A letter from LEA Superintendent Miller to then counsel for Plaintiffs Dayna Deck contains essentially identical language he used in his response to Petitioners after they requested and attended a conflict resolution conference. This assurance consists of Dr. Miller's having been assured by his

own special education administrator "...that the Windsor C-1 School District can provide a free and appropriate education for the student."

Nothing provided to the panel indicates that the LEA complied with the requirements of a conflict resolution conference.

16. I agree with majority's finding. It states, "On April 11, 2000, the parents mailed a request for a due process hearing. A three-day due process hearing was conducted on October 10, 11, and 13, 2000. Both parties were represented by counsel. Parents have since dismissed their counsel."

17. At Vol. II pp. 263-265, Susan Shackelford, the LEA self-contained classroom teacher stated what Majority's Finding #17 indicates. It was, however, within the context of her stated desire to provide an explanation and additional information concerning her classroom and beliefs after having acknowledged to Petitioner's attorney positive points and strengths of the CID curriculum. Respondent's attorney asks (Vol. II p. 263) "...What do you feel compensates for what you articulated as the positives for an education at CID for (student)?"

She replied, "Well, my first thing that I think of is access to the general ed curriculum is ultimately important. I am a firm believer professionally and personally in public education. I believe that our curriculum here at Windsor is top notch and that he should have access to it." (Vol. II, p. 263, L 19-24).

18. In majority's finding, 'LEA's teacher for the hearing impaired testified that based on her experience exposing a student using the auditory oral method to sign language would not inhibit the student's ability as an oral communicator."

However, the parents have clearly selected the oral method and scrupulously avoided other methods (including signing which the teacher Shackelford was using during Plaintiffs classroom observation). Absent an agreement by parents to have their child taught in another language, a new language, which Petitioner

clearly indicated they opposed for various linguistic and learning and other reasons, it is not the classroom teacher's option. Parent clearly expressed her concern at seeing teacher signing not only to children who use signing but also to what Petitioner understood to be a child who used lip reading and aided hearing.

Majority continues concerning Susan Shackelford, "The teacher testified that student could have achieved the same amount of advancement in his speech, language, and listening ability in her classroom as he might have at CID."

It is difficult to reconcile the above statement (Vol. II, p. 223) with the same teacher's statement "We saw "student) that little bit, that one hour, and as any educator will tell you, you don't learn much from a kid in one hour." (Vol. II, p.265, 117-19).

19. Attorney panel member advised that what panel could properly consider was limited to what had transpired by the time of the IEP related events (IEP, conference after IEP). I believe, based on this understanding, that the totality of Mr. Pregon's testimony is properly excluded. He was not employed at the LEA at that time and did not participate in the IEP of this student.

The parents could only base their decision concerning willingness to accept the placement offered by the LEA on the information they had available to them within this same time frame.

20. This panel members finds, with one exception, the items attributed to Terri Shank's testimony, in the transcript of her testimony. The exception relates to the sentence "She agreed with CID testimony that student could learn and benefit outside of an optimal acoustic environment." When this was tracked to Ms. Shank's testimony, she was responding to Mr. Brink's questioning her as to whether or not she recalled Ms. Lanfer's testimony. She answered affirmatively.

A search through Ms. Lanfer's testimony yielded the following; At Vol. 1, pp. 254— Ms. Deck inquires of Ms. Lanler, "...Based on your years of experience in the oral training program, is the acoustical environment important because it allows the child to acquire the language and speech skills at a more successful or a faster rate because they are able to absorb the sounds and hear them better?"

A. "It certainly helps -- helps them--it makes it an optimal learning situation for the child to be able to take out the background noise. Especially when the child is learning these skills. Learning how to listen and learning how to interpret what these sounds are and how to then use that and process it in making it into speech production. So it's important at the developmental ages that the child have an optimal setting for listening."

Q. So that when you do mainstream them and they don't -- they no longer have an optimal setting, they have the ability to discriminate sounds and be able to listen and understand what's going on?

A That's correct

Q. Okay. But in order for them to learn how to do that they really do need an acoustical environment that provides a place for them to learn to discriminate those sounds?

A Yes.

Someone who had not read the entire testimony of Ms. Lanfer or Ms. Shank, or indeed any witness, could reach an incorrect conclusion based on reading individual sentences or selections out of context.

RATIONALE AND DECISION

Based on information available to parents at the time of the IEP on January 19, 2000 and the subsequent settlement conference on 1/31/2000 and related correspondence between parents and LEA, parents determined that despite the IEP whose goals and objectives they essentially did not dis-agree with, the implementation and setting would have precluded Free Appropriate Public Education (FAPE).

After observation of the classroom situation including its physical structure, layout, space usage, ambient noise levels, teacher/student observations and conversation with teacher, parents had significant concerns.

The LEA did not offer a *free appropriate public education* (FAPE) It offered a *free public education*. The setting, method of delivery, ability to meet their own goals and/or standards demonstrates that they could not provide an *appropriate* education.

Ms. Lanfer, the Middle School Co-ordinator at CID testified concerning the need for consistent provision of speech therapy on a daily basis by one individual. The IEP called for *30 minutes of speech therapy on a daily basis, five days per week*. The LEA could provide the same person on a non-daily basis or with two or three different individuals on a daily basis. There is ample testimony concerning the importance of consistency in the provision of this therapy and the difficulties directly attributable to multiple providers for a child with a cochlear implant.

The witnesses from CID testified regarding the necessity of an optimal acoustic environment and the LEA wrote such language into the IEP.

Plaintiff testified she repeatedly inquired as to how the crucial components of the IEP would be implemented as did her attorney by letter to Dr. Miller. The only reply they received was a brief letter in which Dr. Miller, the LEA Superintendent, wrote that he had been assured by his staff they could educate the child. No details or responsive answers were provided.

There were questions raised at hearing as to Dr. Miller's understanding of the resolution conference, his lack of responsiveness and his understanding of the district's legal requirements. These questions were raised by his own testimony.

Additionally, if he did not directly admit that his decision not to contract for outside placement was financially driven, he also did not deny it and he acknowledged discussing financial and insurance details that have no place in deliberations for meeting FAPE.

Dr. Miller stated that his own district's expenses for due process were covered by insurance and that he assumed petitioner's legal expenses were covered by some advocates.

There was conflicting testimony regarding what had been or would be done to the classroom to accommodate petitioner's child including carpeting, acoustical treatment, testing by engineer. He said it had been or would be done. His director of Special Education Services refuted that testimony saying that Dr. Miller had misunderstood.

Susan Shackelford, the self-contained LEA classroom teacher who was expected to teach Plaintiff's child indicated most of child's instruction would be one to one, that there wouldn't be opportunity to work in groups in her classroom because no-one else was at his same academic level, that she never had the classroom noise level checked or tested and did not assume it to be her responsibility to advocate for this, that she used total communication and sign language with some of her students, that she believed in public education personally and

professionally, that student (son of Plaintiff) needed access to academic mainstream (although this was not part of his IEP nor was it recommended for him), that he would only be mainstreamed for non-academic periods (despite CID witness and parental concerns at lack of appropriateness for child) and that the optimal acoustic environment, though written into the IEP, wasn't necessary.

She did not deny Plaintiff's statements that she told her one of her student's hearing aids had not been functioning for a year. She did not deny that Plaintiff expressed her concern regarding a microphone and FM system left open/constant on for one student and its detrimental potential for this child and did not deny replying to parent that no-one had complained about it. (Parent stated her concern centered around her understanding that a personal FM system was intended to be used when there was communication pertinent to this child, either individually or as part of a group and that having it on or open constantly meant that the child's work and concentration would be disturbed by everything picked up on the teacher's open microphone).

Ms. Shackelford acknowledged the interruptions the parent had cited as disruptions; PA announcements, office messengers, and traffic in and out a door immediately adjacent to table where student was receiving speech/language therapy.

If the parents considered that their child could not receive an education in such a setting and had concerns and questions regarding reduction of static electricity exposure for their child and received few direct answers to questions regarding how controls would be implemented, from where could they draw any confidence that their child would be educated let alone safe?

The unusual situation of having had three implants fail and the need for additional surgery and perhaps a fourth attempt at a cochlear implant underscore a need for special understanding and a clear commitment on the part of the LEA which parents clearly did not feel they had.

I do not concur with my fellow panel members' view that by age 10 (at time of IEP) this child has had enough private placement education and needs to be exposed to the regular world where his parents indicate they want him to be able to function. While this belief may or may not be applicable in general or in other unique circumstances, it fails to adequately take into account the highly atypical circumstance of child's having experienced three failed implants, the interruptions to orderly steady acquisition of the basics of language, meaning and communication and the enormous burden these circumstances place on this child.

Witnesses for both Plaintiff and Respondent stated the average reading level of a deaf person in the United States is at grade 4. This child's same age hearing peers are in grade four. This child reads at a grade 2 level, has a 45 point spread between his verbal I.Q. and performance I.Q. (where a 15 point spread is commonly held to be a significance threshold). CID testified about the progress and growth this child has made. Parents agreed. CID provides an optimal acoustic environment, addresses the child's special needs, deals with the child's attentional issues (an area of significant importance not addressed either by the IEP or the LEA).

Respondent's proposed placement does not meet the student's unique needs including a sound acoustic environment (and details to assure parents what would be done), a safe environment with static electricity vigilantly monitored, appropriate therapy, adult deaf role models, small group work environment designed to maximize lip reading ability as well as age and communication appropriate peer groups- (all listed within the IEP). The educational setting proposed by the LEA component of the IEP team would have been most restrictive, not least restrictive as well as isolating- emotionally socially and educationally.

A question is raised in this hearing officer's mind regarding the issue of "optimal acoustic environment". The LEP team included statement in the IEP that student requires an optimal acoustic environment. Out of context, Terri Shank, Special Education Director for LEA, indicates she agreed with CID testimony (also taken out of context at Vol. I, p. 257) that a student could learn and benefit outside an optimal acoustic environment.

Pages 254-257 (Vol. I) explain the importance of an optimal acoustic environment for children with cochlear implants.

The questioning by the LEA attorney of the LEA Director of Special Education, of the classroom teacher both of whom participated in the IEP concerning why optimal acoustic environment was included in the IEP and the elicited the following answers; "The parents or CID put it in" or "That just referred to present level of IEP" giving the impression the LEA not only did not consider this an issue they wanted to address despite not having objected to including it in IEP but perhaps an attempt at justifying a distancing of their agreement and/or acquiescence to providing what they agreed to provide to meet student's unique needs.

Testimony has demonstrated that the LEA is unable to implement the IEP and to provide

FAPE.

Parents are entitled to reimbursement.

APPEAL PROCEDURE

Either party has the right to appeal this decision within 30 days to a State Court of

competent jurisdiction pursuant to Chapter 536 of the Revised Statutes of Missouri, or to

a Federal Court.

In support of the Dissenting Opinion

Karen F. Schwartz

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served this 15th day of December, 2000 by certified first class mail, postage pre-paid, on the individuals listed below:

Pam Williams, Director of Compliance

Special Education Legal Services

Department of Elementary and Secondary Education

POB 480

Jefferson City, MO 65102-0480

Karen F. Schwartz

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served this 15th day of December, 2000 by first class mail, postage prepaid, on the individuals listed below;

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